REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO.151 OF 2012

ANTHONY MUGENDI NDWIGA...................................... APPELLANT

VERSUS

REPUBLIC .... PROSECUTOR

From original conviction and sentence in Criminal Case No. 625 of 2012 at the Principal Magistrate's Court at Runyenjes by Hon. J.P. NANDI -RM on 26/9/2012

J U D G M E N T

ANTHONY MUGENDI NDWIGA the Appellant was charged with the offence of shop breaking and stealing contrary to section 306(a) of the Penal Code.

The particulars as stated in the charge sheet were as follows;

> **ANTHONY MUGENDI NDWIGA: On the night of the 6th and 7th July 2012 at Kang'ethire village in Embu county, jointly with others not before Court, broke and entered the shop of DENNIS KINYUA FUNDI with intent to steal therein and did steal therein two radios make AOYOTA and SONITEC, one mobile phone make Nokia N95 and assorted shop goods namely two bales of wembe maize meal, one and a half bale of wheat flour, 15 kilos of sugar, 20 kilos of rice, six packets of supermatch cigarettes, a carton of tiger bar soap, a carton of mallo cooking fat, one dozen of golden lion dry cells and cash kshs.1,800/= all valued at kshs.20,767/= the property of the said DENNIS KINYUA FUNDI.**

Alternative Count

Handling stolen goods contrary to section 322 (1) (2) of the Penal Code.

The particulars as stated in the charge sheet were as follows;

> **DENNIS MUGENDI NDWIGA: On the 8th July 2012 at Runyenjes Township in Embu County, otherwise in the course of stealing dishonestly retained one AOYOTA Radio, three packets of Wembe maize meal, two pieces of tiger bar soap (halves), ¾ kilos of sugar, three kilos**

of rice measured in ½kg, a pair of golden lion dry cells and seven pieces of cooking fat knowing or having reason to believe them to be stolen goods.

The matter proceeded to full hearing and the Appellant was convicted of the principal count and sentenced to three (3) years imprisonment. He has filed this appeal raising the following grounds;

1. ***That the learned trial Magistrate erred in both law and fact when he convicted the Appellant relying on evidence which was inconsistent and uncorroborated.***
2. ***The learned trial Magistrate while delivering the Judgment failed to consider the fact that the Appellant's constitutional rights were violated when he was held in police custody for more than 24 hours.***
3. ***The learned trial Magistrate erred in both law and facts when he failed to consider the fact that the exhibits brought in Court were his personal items.***
4. ***The learned trial Magistrate failed to give cogent reasons as to why the Appellant's defence was rejected.***

Brief facts are that PW1 locked his shop on 6/7/2012 at 8pm and went to sleep at home. The next morning he found it broken into and the items mentioned in the charge sheet missing. On 8/7/2012 at 4pm his brother (PW2) informed him of the Appellant who was selling a radio at 200/=. They met the Appellant who told them one Reuben had given him the radio to sell. He took them to Rukiriri Sacco but they missed the said Reuben. The Appellant tried to run away but he was arrested and taken to the police station. Police officers from the police station went to the house of the Appellant and returned with several shop goods EXB2 – 7 which were identified by PW1 as his stolen items. The Appellant was then charged.

In his unsworn defence he denied the offence and said the items he was arrested with were his.

When the appeal came for hearing the Appellant presented the Court with written submissions. He has essentially expounded on his grounds. He also raised issue with language used in the proceedings. The State through the learned State Counsel opposed the appeal saying there was overwhelming evidence adduced against the Appellant.

This being a 1st appeal this Court is enjoined to re-evaluate and re-consider the evidence and arrive at its own conclusion. I also bear in mind that I did not see nor hear the witnesses. I am well guided by the case of ***MWANGI –V- REPUBLIC [2004]2 KLR 28*** where the Court of Appeal held thus;

1. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate Court's own decision on the evidence.***
2. ***The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.***
3. ***It is not the function of the first appellate Court merely to scrutinize the evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.***

I have well considered the submissions by the Appellant and those of the State plus the grounds of appeal. I have equally considered the evidence on record.

In his submissions the Appellant has raised an issue of the learned trial Magistrate not recording the language of interpretation. The issue of violation of constitutional rights has also been raised. I propose to address the issues together. A perusal of the record shows that the charge was read to the Appellant in Kiembu language and he responded in Kiembu. There was a clerk by the name Mwaniki in Court. The Appellant does not say he did not understand the language that was used in Court. He says the learned trial Magistrate did not indicate the language used. He does not say that he did not understand the

interpretation. The record also shows that the language of use by the three witnesses was not indicated by the Court. Interpretation is a constitutional right which must be safe guarded by the Court. In the case of ***KATIKENYA –V- REPUBLIC [2007]1 E.A. 133*** the Court of Appeal stated thus;

> ***"The trial Magistrate was careless in the manner she handled the case. She did not indicate in what language or languages the proceedings were conducted. Nor did she indicate whether the Appellant or witnesses understood the English language, which is the language of the Court. A careful reading of sections 197 and 198 of the Criminal Procedure Code clearly shows that a failure to show demonstrably the language used in criminal proceedings will, in an appropriate case, this being one, vitiate the trial.***
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> ***It is true that the Appellant was given an opportunity to cross-examine various witnesses. However, he faced capital charges and he stands convicted of the same. It may not be possible to fathom the extent of the prejudice that might have been occasioned to him. Hence the Appellant's trial was unsatisfactory".***

And in the case of ***IRUNGU –V- REPUBLIC [2008]1 E.A. 126*** the Court of Appeal stated thus;

> ***Thus in law at the trial of an accused person, the Court must ensure not only that the charge is explained to the accused in a language the accused understands but the Court is further enjoined to ensure that the evidence given during trial is interpreted to the accused in a language the accused understands. These are legal requirements. They are constitutional rights of an accused person and cannot be waived in the belief that the accused understands the language if the Court particularly when the accused stated that he was not good in English or Kiswahili.***
>
> ***It's the Court's duty to ensure that the accused right to interpretation is safeguarded and to demonstratively show its protection.***

The Court of Appeal in the case of ***KIBATHA –V- REPUBLIC [2007]2 E.A. 245*** held thus;

> ***"A Court can only demonstratively show that the rights of an accused person under section 77 have been protected if its record shows that that has been the case. The record of the Magistrate in this appeal does not show that the trial Court protected the Appellant's right to have the proceedings interpreted to him in the Kikuyu language (JACKSON LESKEI –V- REPUBLIC CRIMINAL APPEAL NUMBER 313 OF 2005 (UR) followed***)".

From the above authorities it is clear that an accused person's right to interpretation is a constitutional right. And it has to be demonstrated through the record that such right has been protected.

A perusal of the record shows that the Appellant only asked one or two questions to the witnesses in cross examination. This makes this Court wonder whether the Appellant understood the language used. The next issue he has raised is about his being held for more than 24 hours in the cells. He was arrested on 8/7/2012 which was a Sunday. He ought to have been arraigned in Court on 9/7/2012 but he appeared on 10/7/2012. There was no explanation for this delay by the Prosecution and neither did the learned trial Magistrate ask for any explanation. It cannot be assumed as the learned State Counsel wants this Court to believe that investigations were being done hence the delay. There ought to be a record showing it.

These two issues are good enough to make me allow this appeal. I wish to however briefly analyse the evidence . There was no witness who saw the Appellant commit this offence. The Court therefore relied on the evidence of possession to convict him. When can possession be relied on to convict? In the case of ***ARUM –V- REPUBLIC [2006]1 KLR 233*** the Court of Appeal stated thus;

1. ***Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof.***

a. ***that the property was found with the suspect***
b. ***that the property was positively the property of the complainant***
c. ***that the property was stolen from the complainant***
d. ***that the property was recently stolen from the complainant***

2. ***In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot be suffice, no matter from how many witnesses.***
3. ***In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence analyzing it and accepting that it considers it to be correct and honest version.***

In this case it was stated that the Appellant was found in possession of a radio. Did PW1 prove to the satisfaction of the Court that the said radio belonged to him? This is what he said at page 3 lines 6-8;

> ***"On 8/7/2012 went to Runyenjes at about 4pm when my brother came and took me to view a radio as accused person was selling the same at kshs.200/=. I viewed the same and identified it".***

And in cross-examination he says at page 3 line 17;

> ***"The radio is mine. I do not have a receipt as I bought it as second hand".***

It's clear that from this narration there is nothing to show that PW1 identified this radio (EXB1). This is however what PW3 (a brother of PW1) stated at page 4 lines 21-30;

> ***"On 8/7/2012 while at Runyenjes I met the accused who asked me if I wanted to buy a radio. I told him I do not have money. I came and told my brother who came and identified the radio. The accused told us he had been given the radio by somebody to sell. The accused took us to where the person who had given him was but we did not find him. The accused tried to run away but we managed to arrest him and escorted him to police with the radio. This is the said radio exhibit 1.***
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> ***<u>Cross examination by accused</u>: The complainant identified the radio. You wanted to sell the radio to me. I read the name on the radio and told PW1".***

PW3 could identify the radio even better than the alleged owner! It is clear that even PW3 did not identify the radio to the Court.

My finding on this is that the radio was not positively identified as belonging to PW1. Secondly it was stated by PW2 that police officers went to the Appellant's house and recovered certain shop goods. PW1 was not in their company to identify the said goods. Furthermore PW2 only received the Appellant and the goods at the police station. He was not one of the officers who went to the Appellant's house. None of those who went there testified.

In his defence the Appellant said the items he was arrested with were his. How could that be disputed when the alleged owner did not prove ownership? My finding is that the learned trial Magistrate was not keen to follow due process in hearing this case giving rise to the **two** constitutional issues raised hereinabove. Secondly had he analysed the evidence well he would not have convicted the Appellant. The result is that the appeal must succeed. I allow it and quash the conviction. The sentence is also set aside. The Appellant to be set free unless otherwise lawfully held under a separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing’ahizu for State

Appellant

Njue – C/c